SUPREME COURT OF QUEENSLAND

CITATION:	*R v Murray* [2010] QCA 266
PARTIES:	**R** **v** **MURRAY, Stuart James** (applicant)
FILE NO/S:	CA No 119 of 2010 DC No 1682 of 2009 DC No 244 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	8 October 2010
DELIVERED AT:	Brisbane
HEARING DATE:	30 September 2010
JUDGES:	Fraser and Chesterman JJA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application to set aside the order is granted to the extent of setting aside the serious violent offender declaration made and substituting for it a declaration that the applicant was convicted of a serious violent offence;** **2. The application is otherwise refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted on his own pleas of guilty of six indictable offences and two summary counts – where the applicant was convicted of two counts of aggravated stalking, one count of assault occasioning bodily harm, one count of stealing, one count of threatening to enter premises with intent to intimidate, and one count of doing grievous bodily harm with intent – where an alternative charge of attempted murder was open on the last indictable offence – where the learned sentencing judge imposed a concurrent sentence of eight years imprisonment – where the learned sentencing judge made a declaration pursuant to s161B(3) of the *Penalties and Sentences Act* 1992 (Qld) – where the learned sentencing Judge did not give

reasons for making such a declaration – whether the sentence imposed was manifestly excessive – whether the declaration should have been made

Penalties and Sentences Act 1992 (Qld), s 161B(3)

R v Daley [1999] QCA 332, cited
R v McDougall and Collas [2007] 2 Qd R 87; [2006] QCA 365, cited
R v Nguyen [2006] QCA 542, cited
R v Williams [2002] QCA 142, cited

COUNSEL: J Cremin for the applicant (pro bono)
G Cummings for the respondent

SOLICITORS: No appearance for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Cullinane J and the orders proposed by his Honour.

[2] **CHESTERMAN JA:** I agree with orders proposed by Cullinane J for the reasons given by his Honour.

[3] **CULLINANE J:** The applicant seeks leave to appeal against sentences imposed in the District Court at Brisbane on 30 April 2010. The applicant had pleaded guilty to these offences on 7 July 2009.

[4] There were in all some six indictable offences and two summary counts.

[5] Of the indictable offences, there were two counts of aggravated stalking, one count of assault occasioning bodily harm, one count of stealing, one count of with intent to intimidate threatening to enter premises, and one count of doing grievous bodily harm with intent to do grievous bodily harm. The applicant had been charged with attempted murder with the last mentioned indictable offence as an alternative to that count. The plea of guilty to doing grievous bodily harm with intent to do so (count 7) was accepted in discharge of the count of attempted murder. The two summary charges related to the contravention of a protection order made under the *Domestic and Family Violence Protection Act* 1989 (Qld).

[6] The offences were committed between 15 September 2006 and 6 June 2007.

[7] All of the offences involved the same complainant, a woman with whom the applicant had been in a relationship since late 2005. The complainant had by the end of this period formed a new relationship.

[8] The learned sentencing Judge imposed a sentence in respect of count 7 of some eight years imprisonment and made a declaration under the provisions of s 161B(3) of the *Penalties and Sentences Act* 1992 in respect of that conviction.

[9] Various terms of imprisonment were imposed in respect of the other indictable offences. No further punishment was imposed in respect of the summary offences beyond the recording of a conviction. All terms of imprisonment were ordered to be served concurrently.

[10] The applicant had been in custody for a substantial period prior to the imposition of sentence and declarations were made in respect of that pre-sentence imprisonment. In fact, the pre-sentence imprisonment in respect of count 7 (and certain other counts) was somewhat longer than the pre-sentence imprisonment in respect of counts 1, 3 and 5. The declarations made reflected these different periods of imprisonment.

[11] This application is concerned with the declaration made in respect of count 7 under s 161B(3) of the Act and the term of imprisonment imposed in respect of that count.

[12] The applicant was born on 15 August 1970.

[13] He had a criminal history which included offences of violence and a breach of a domestic violence order.

[14] Two of these offences involved violence against his mother and the other offence involved an attack upon his then partner at a time when a domestic violence order taken out by her was in force.

[15] An agreed schedule of facts was tendered. As will be seen the various offences involved continuing harassment on the part of the applicant against the complainant which culminated in count 7.

[16] The agreed statement of facts in relation to count 7 merits being set out in its entirety:

> "On 5 June 2007, the complainant got her new partner and children ready for work and school. After dropping off her children at their different schools, the complainant arrived home about 9am. The complainant opened her garage door with the remote control and drove inside.
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> The complainant entered the house through an internal door and locked the door afterwards. At about 9:05am the complainant received a telephone call and then put on a load of washing. The complainant went to get changed and walked into her bedroom. She observed the bedroom door was open and saw the defendant standing against the wall next to the door on her left. The defendant was holding a frying pan above his head with both hands. The complainant saw the defendant swing down the frying pan onto her and felt it hit the top left of her head. As a result, the complainant fell to the ground.
>
> The complainant was hit at least a further two times on the head, on the top right and left of her head. The complainant asked *'What have I done. I have three children'*. The defendant said *'Stop screaming. Be quiet'.*
>
> The defendant was standing on the left side of the complainant and pulled out a knife from his pants. The knife was approximately 30 - 40cm long, with a dark handle and the blade was about 20cm long and wide. The defendant held the knife against the right side of the complainant's throat, and the complainant felt the knife pressed against her neck.

The complainant scared kept saying *'I have three kids. What have I done?'* The defendant tied the complainant's wrists with black zip ties, which the defendant brought to the house. The ties hurt the complainant and her bracelet broke as the defendant tied her up. The defendant tied the complainant's ankles, which caused discomfort to the complainant as the ties cut into her skin.

The defendant said *'Come one we are going'* and the complainant asked to walk. The defendant lifted up the complainant, placed the knife down his pants and the complainant fell over. The defendant then dragged the complainant out to the garage and in the process grabbed the complainant's spare car key from the kitchen bench. The complainant was dragged to the passenger side of the car and placed into the rear of the car on the floor.

The complainant fearing for her safety, unlocked the passenger side door and launched herself out of the car. She started screaming out to one of her neighbours, screaming *'Kerry help me'*. The defendant come around the back of the car to the complainant and pulled out a knife. The complainant continued to scream out for help. The defendant bent over the complainant and stabbed her in the left side near her arm pit. The defendant again stabbed the complainant in the stomach on the right side.

As a number of people responded to the complainant's screams, the defendant dropped the knife. The defendant was seen leaning over the complainant before he stood up and walked away. One of the witnesses (Richard ANLEZARK) observed the defendant walking away from the garage and ran over near the defendant. ANLEZARK spread out his arms to stop the defendant from walking away and said *'I don't think you should be going anywhere'*. The defendant said to ANLEZARK *'I've got to go'*. The complainant's neighbour (David FORSYTH) said to ANLEZARK *'No, we need to help Cindy'*.

The witnesses assisted the complainant and telephoned triple zero and applied pressure to the complainant's wounds using their t-shirts. The witnesses cut the ties from the complainant's hands and feet. Both police and ambulance attended and transported the complainant to the Royal Brisbane Hospital

Medical Treatment

The complainant was seen at the Royal Brisbane Hospital and the following injuries were observed:

- Laceration left axilla (armpit), 10 cm long and 5 cm wide with a venous bleed;
- Stab wound to the right upper quadrant;
- Contusions to the head; and
- Lacerations to left and right hands.

On same day, the complainant received the following treatment in theatre:

- A laparotomy (incision through the abdominal wall to gain access into the abdominal cavity);

- Repair of laceration on the anterior wall of the stomach;
- A liver laceration was packed;
- Repair of the laceration of her left anterior abdominal wall;
- Closed a wound with simple closure;
- Repair of laceration to the left index finger, closed with nylon;
- Repair of laceration of middle finger with non absorbable suture;
- Repair of fractured proximal phalanx (finger) with screws;
- Repair of right little finger had a superficial laceration, closed with nylon

Further, on 8 June 2007 the complainant again underwent surgery to remove abdominal packs and there was no sign of further bleeding. The lacerating injuries were life threatening. The complainant remained in Intensive Care Unit from 5 to 8 June 2007 and was later discharged from the hospital on 12 June 2007.

There have been lasting effects of the injuries to the complainant. The complainant has a permanent injury to her finger with a loss of mobility. The complainant has pronounced scarring to her shoulder and stomach area. There has been some nerve damage to her left arm leaving a sensation of 'numbness' on occasions.

Arrest and Detection

On that day, police located the defendant driving along the Bruce Highway (near the Mooloolaba exit) and arrested the defendant. The defendant participated in an interview with police. The defendant denied having any knowledge of the attack on the complainant. The defendant told police that day he had driven to a park and attempted to kill himself (gassing himself in his car). The defendant stated the car nearly ran out of petrol, he went to get more petrol and was met by police.

When police questioned the defendant about stabbing the complainant, the defendant responded *'I don't know.'*

[17] The first of the complaints made on this appeal relates to what is said to be an error in principle in considering the question of whether the declaration ought to have been made. It is said that the learned sentencing Judge gave no reasons for making the declaration and that the failure to give reasons should be regarded as an appellable error. Reference was made to *R v McDougall* [2006] QCA 365 which dealt with the considerations which apply when a Court considers the exercise of the discretionary powers granted under s 161B(3).

[18] The applicant contends that it is impossible in a case such as the present for the Court to be satisfied that the learned sentencing Judge approached the matter by reference to those considerations or had not taken into account considerations that ought not to have been taken into account.

[19] It is true that the learned sentencing Judge did not in the reasons given when imposing sentence set out the reasons why the declaration was made. However, in the course of argument Counsel for the Prosecution had set out in some detail the

reasons why it was contended that it was appropriate to make such a declaration.[1] This was also set out in a written document which was handed up in the course of argument but has not been made part of the record. These factors were included in the agreed statement of facts set out above and supported the making of the declaration.

[20] Counsel for the Prosecution informed the learned sentencing Judge that he understood that Counsel who appeared for the applicant did not intend to contend that it was not a case in which the declaration should be made.

[21] Counsel who appeared for the applicant on sentence informed the Court:

> "It is impossible for me to make a submission that this isn't a case where it would be appropriate for your Honour to make a serious violent offender declaration." [2]

[22] The authorities speak of the need to take an integrated approach to sentencing where a declaration is to be made under s 161B(3). This requires a focus upon the impact overall of the sentence and declaration. His Honour referred to this and to the concession made by Counsel for the applicant:

> "The law requires that I must take what is called an integrated approach to sentencing in cases particularly where a serious violent offender order is appropriate. In my view it is plainly appropriate here, and counsel quite fairly and properly concedes that to be so."[3]

[23] Whilst His Honour did not specify in his sentencing remarks the various reasons why such a declaration was appropriate his remarks can only be understood as an acceptance of the appropriateness of the declaration for the reasons advanced by the Prosecution. Defence Counsel did not demur from these.

[24] There was a dispute between Counsel before the learned sentencing Judge as to the appropriate term to be imposed in the integrated approach to which reference has already been made.

[25] Here Counsel for the applicant contends that the sentence of eight years was manifestly excessive and submitted that it was outside of the range established by the various authorities placed before the learned sentencing Judge and that it failed to make appropriate allowance for the psychiatric problems which the applicant has suffered from and the steps he has taken to overcome these and thus reduce the risk of re-offending.

[26] The material before the Court included a psychiatric report by Dr Schramm and a report of a psychiatric registrar from the Prison Mental Health Service.

[27] His Honour made express reference to these matters and there is in my view no basis for the claim that appropriate allowance has not been made for them nor for any contention that due allowance was not made for his plea of guilty.

[28] Each Counsel placed a number of cases before the learned sentencing Judge in support of their respective contentions as to the appropriate term in respect of count 7. The prosecutor handed a schedule of such cases to the Court and this is included in the record.

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1 R. p.34 at 20-50.
2 R. p.61 at 25-35.
3 Ibid.

[29] A consideration of those cases and those referred to before this Court and in particular cases such as *R v Williams* [2002] QCA 142, *R v Nguyen* [2006] QCA 542 and *R v Daley* [1999] QCA 332, in my view makes it clear that the sentence of eight years imprisonment with a declaration was not outside of the sentencing range open to the learned sentencing Judge. There is in my view no error demonstrated in the reasons of the learned sentencing Judge nor in the sentence imposed.

[30] Our attention was drawn by Counsel for the respondent to the form of the declaration made by the learned sentencing Judge, a declaration that the applicant was a 'serious violent offender'. The declaration should have been that the applicant had been convicted of a serious violent offence.

[31] I would grant the application and set aside the order made only to the extent of setting aside the declaration made and substituting for it a declaration that the applicant has been convicted of a serious violent offence.

[32] The application should otherwise be refused.